STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 15, 2011
v	No. 300720 Kent Circuit Court
JAYSON MICHAEL CHAPIN, Defendant-Appellant.	LC No. 09-012817-FH

Before: MARKEY, P.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of operating a motor vehicle under the influence of intoxicating liquor (OUIL), third offense, MCL 257.625, and driving with a suspended license, second offense, MCL 257.904. The trial court imposed a sentence of two to ten years' imprisonment for both sentences, to be served concurrently. Defendant's sentence began on August 6, 2010 and he received 61 days credit for time served. Defendant appeals as of right. For the reasons set forth in this opinion, we affirm in part, but vacate defendant's sentence as it relates to his misdemeanor driving with a suspended license conviction and remand for resentencing on that offense.

About 12:40 a.m. on September 18, 2009, Officer Chad Rosema of the Grandville Police Department was on patrol. He was stopped at a red light on Rivertown Parkway at the Wilson Avenue intersection. A car travelling on Wilson Avenue passed through the intersection. Officer Rosema believed the car to be travelling above the posted speed limit and turned onto Wilson Avenue to follow the car. The car immediately made an abrupt turn into the parking lot of a Fifth Third Bank and proceeded through the parking lot to a connected D & W parking lot. Officer Rosema followed the car into the Fifth Third parking lot and was approximately 30 to 40 yards behind the vehicle as it moved into the D & W parking lot. The vehicle parked in the D & W parking lot and Officer Rosema stopped in the Fifth Third parking lot. Officer Rosema testified that he maintained visual contact with the car at all times and never observed another person in the vehicle.

Ten seconds after the car parked, defendant exited the vehicle from the driver's side. Officer Rosema had an unobstructed view of the vehicle and he saw no one else exit the vehicle. Officer Rosema drove into the D & W parking lot, parked near defendant, and ran the license plate number on the vehicle. According to the officer's testimony, he observed defendant walk

from the car towards D & W, trying to enter the building, but it was closed. Defendant then urinated on the side of the building. Having witnessed this infraction, Officer Rosema got out of his car to speak with defendant. As defendant turned away from the building he was zipping up his pants and Officer Rosema observed what appeared to be urine stains on defendant's pants. When Officer Rosema advised defendant that urinating on a building was not allowed, defendant denied urinating on the D & W building. As defendant walked from the building towards Officer Rosema's car, Officer Rosema observed defendant stumbling slightly. As defendant got closer, Officer Rosema could smell alcohol and, as they spoke, Officer Rosema noticed defendant's speech was slow.

Suspecting defendant was intoxicated, Officer Rosema asked defendant to perform a number of field sobriety tests, all of which defendant declined to do. Defendant told Officer Rosema "you didn't catch me driving" and he claimed to have walked to the D & W parking lot from Chicago Drive. Officer Rosema arrested defendant for OUIL, finding the key to the vehicle in the pocket of defendant. A sample of defendant's blood was collected and sent for testing. Analysis revealed a blood alcohol content of 0.19.

Defendant was held at the Kent County Jail. While in jail, defendant made three telephone calls to his friend, Jimmy Boersma. Defendant asked Boersma to call defendant's wife, Anna Mae Chapin, and let her know defendant was in jail. In describing the events of the evening, defendant told Boersma, "I wasn't driving when they caught me" and "I was never behind the wheel when they actually came up to me." Defendant never stated he had not been driving the vehicle on the night in question, only that police had not actually caught him in the car. The calls were played for the jury during trial.

In June of 2010, almost nine months after the incident, defendant's wife, Anna, made the claim that she was the driver of the car. Anna did not approach the police or the prosecutor with her claim, but instead told defendant's attorney. When approached by police about her claim, she declined to speak with them. Anna claimed she waited so long to come forward as the driver of the car because she believed her husband would not be prosecuted, because he was not caught driving the car. She also indicated her husband did not wish her to become involved.

In accord with her statement to defense counsel, Anna testified she was the driver of the vehicle. Based on defendant's claim that Anna was actually the driver of the car, the trial court, under MRE 404(b), permitted the prosecution to present evidence of an incident that took place in 2003. Before allowing introduction of the 2003 incident, the trial court offered a cautionary instruction to the jury. Defendant was convicted and sentenced as stated above. This appeal ensued.

On appeal, defendant first argues that the evidence of a 2003 incident that led to his conviction for OUIL was inadmissible. We review defendant's objections raised during trial for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). An abuse of discretion occurs only where a trial court's decision falls outside the range of "reasonable and principled outcomes." *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008).

MRE 404 prohibits the admission of evidence of "other crimes, wrongs, or acts" in order to prove character or show action in conformity therewith. MRE 404(b)(1). However, while

such evidence may not be used to show a person's character, it may be admissible for other purposes including proof of a scheme or plan. *Id.* MRE 404(b) is "inclusionary rather than exclusionary." *People v VanderVliet*, 444 Mich 52, 64; 508 NW2d 114 (1993), quoting *People v Engelman*, 434 Mich 204, 213; 453 NW2d 656 (1990). In order to have evidence admitted under MRE 404(b), the proponent of the evidence must show three things:

> (1) that the other acts evidence is for a proper purpose (other than to show character and action in conformity therewith), (2) that the evidence is relevant to an issue of fact that is of consequence at trial, and (3) that, under MRE 403, the danger of unfair prejudice does not substantially outweigh the probative value of the evidence. [*People v Steele*, 283 Mich App 472, 479; 769 NW2d 256 (2009), citing *People v Sabin*, 463 Mich 43, 55-56; 614 NW2d 888 (2000).]

Evidence of a scheme or plan is one of the enumerated examples of a proper purpose for which other acts evidence might be admitted. MRE 404(b). The common features, and resulting plan, "need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense." *Sabin*, 463 Mich at 66 (quotation omitted). Relevant evidence is that which has any tendency to make the existence of a fact more or less probable than it would be without the evidence. *Id.* at 60.

The evidence presented in this case demonstrates a common plan or scheme to avoid responsibility for the crime by defendant exiting the vehicle in the parking lot and contending that his former girlfriend, now wife, was the driver of the motor vehicle. Additionally, it was not until defendant placed the matter at issue in the case by denying he was driving and asserting his wife was the driver that the prior incident became relevant. *Sabin*, 463 Mich at 60. Because defendant's actions in 2003 were relevant to establishing his current scheme, and admission of the evidence was not unfairly prejudicial, the trial court did not abuse its discretion in admitting the evidence.

More specifically, both incidents manifest a common scheme employed by defendant when he is caught drinking and driving. In both incidents, when defendant spotted a police officer he immediately drove into a parking lot and parked. Not only did defendant get off the road, he immediately exited the vehicle. Defendant's own statements to the police, and in his telephone calls from jail, indicated an erroneous belief that if he was not caught behind the wheel, he could not be convicted of OUIL. That defendant has attempted this scheme before is relevant to explaining why, in the present circumstances, defendant drove into the parking lot and exited the vehicle. It offered proof to contradict defendant's claim that his wife was driving and she pulled over because they were in the middle of an argument.

As in 2003, defendant's present scheme involved his wife's intervention. In 2003, when approached by police, defendant exited the vehicle, declined to provide his license, offered a false name, and generally refused cooperation. In contrast, his wife offered her name, her driver's license, and she volunteered that they did not have papers for the car because she was test driving it. In the current offense, defendant's wife once again intervened on defendant's behalf, this time going so far as to testify to being the driver of the car. While the exact role defendant's wife played in 2003 may differ factually from her present involvement, it is within

the range of reasonable and principled outcomes to conclude his wife's involvement in both cases manifested defendant's plan to avoid liability by having his wife take the blame.

We also find the admission of the 2003 evidence was not unfairly prejudicial. Evidence otherwise admissible under MRE 404(b) may be excluded under MRE 403 when its probative value is substantially outweighed by the danger of unfair prejudice. *Steele*, 283 Mich App at 479. MRE 403. Evidence is only inadmissible when it is *unfairly* prejudicial, that is "when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). The trial court is in the best position to weigh prejudice and probative value, and to gauge the effect of evidence. *People v Ackerman*, 257 Mich App 434, 442; 669 NW2d 818 (2003).

Here, as explained above, the 2003 evidence was probative as to the scheme defendant was currently using to escape responsibility. While there may have existed a danger of prejudice from the introduction of defendant's past OUIL, prejudice alone does not make evidence inadmissible. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995). Balanced with the significant probative value of the evidence in tending to show a common plan or scheme, especially in light of the defense defendant chose to present, we conclude that any unfair prejudice did not substantially outweigh the evidence's probative value. The trial court's decision is further justified in light of the limiting instruction provided to the jury which confined the danger of unfair prejudice by restricting the jury's use of the evidence. *People v Pesquera*, 244 Mich App 305, 320; 625 NW2d 407 (2001). We find no error.

Defendant also challenges the admission of the evidence under MRE 608(b). Because defendant failed to raise this objection during trial, we review the issue for plain error. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). MRE 608(b) prohibits the use of extrinsic evidence to prove specific instances of conduct for the purpose of attacking a witness' credibility. Had the 2003 evidence been admitted for the purpose of impeaching the character of defendant's wife, defendant's MRE 608(b) argument might have some merit. However, the evidence was not offered to impeach her credibility; it was properly admitted to show a common scheme as permitted by MRE 404(b). A cardinal rule of evidence is that evidence that is inadmissible for one purpose may nevertheless be admitted for a different purpose. *Yost*, 278 Mich App at 355. Consequently, we cannot find any error.

Next, defendant challenges the legality of the sentence imposed for his misdemeanor conviction. Defendant contends, and the prosecution agrees, that his sentence of two to ten years' imprisonment for driving with a suspended license is invalid. Based on the rulings of this Court and our Supreme Court in *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997); *People v Whalen*, 412 Mich 166, 169; 312 NW2d 638 (1981); *People v Shipley*, 256 Mich App 367, 378; 662 NW2d 856 (2003), we concur. By statute, the maximum sentence the trial court could impose for a second offense was imprisonment for not more than 1 year. MCL 275.904(3)(b). The judgment of sentence reflects a term of two to ten years' imprisonment for both the driving with a suspended license and OUIL. This sentence exceeds the statutory limit and is therefore invalid. We therefore vacate defendant's sentence for driving on a suspended license and remand for resentencing.

Finally, we disagree with defendant's assertion that he is entitled to 116 days credit for time served rather than 61 days. Defendant is entitled to credit for time served before a sentence begins pursuant to MCL 769.11b. Defendant's sentence began on August 6, 2010, not on September 29, 2010 as defendant asserts. Both the judgment of sentence and the court record reflect the court's intent to begin defendant's sentence on August 6, 2010. Before August 6, 2010, defendant had served only 61 days, and he was properly awarded credit for 61 days served. The additional 55 days defendant claims credit for are actually already accounted for in his sentence because he began to serve his sentence on August 6, not on September 29.

Affirmed in part, but defendant's driving with a suspended license sentence is vacated and we remand for resentencing on that offense. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Stephen L. Borrello